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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Division 1, Chapter 4, Subchapter 7, Article 10, New Section 3380.1
of the General Industry Safety Orders

Employer Duty to Pay for Personal Safety Devices and Safeguards

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD

There are no modifications to the information contained in the Initial Statement of Reasons except for the following sufficiently related modifications that are the result of public comments and/or Board staff evaluation.

New Section 3380.1. Employer Duty to Pay for Personal Safety Devices and Safeguards

This section would clarify to the employer that required personal safety devices and safeguards shall be provided at no cost to the employee whenever any Title 8, Division 1 safety order requires that those items be provided, furnished, used or worn by the employee. The proposal is necessary in order to avoid any ambiguity in this regard and to provide clearer consistency with equivalent federal standards.

Modifications were proposed to add exceptions derived from 29 CFR 1910.132 (h)(2)-(6), and a 15-day Notice of Proposed Modifications was mailed on February 16, 2011.

SUMMARY AND RESPONSES TO WRITTEN COMMENTS

I. Written Comments

Van A. Howell, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated December 23, 2010.

Comment:

Mr. Howell stated that the new Section 3380.1 as proposed appears to be commensurate with Federal regulations.

Response:

The Board acknowledges Federal OSHA's opinion regarding the proposal.

The California (CA) Association of Sheet Metal and Air Conditioning Contractors' National Association, CA Chapter of the American Fence Association, CA Fence Contractors' Association, CA Chapters of the National Electrical Contractors Association, CA Legislative Conference of the Plumbing, Heating and Piping Industry, Construction Employers Association, Engineering Contractors' Association, Engineering and Utility Contractors Association, Flasher/Barricade Association, Golden State Builders Exchange, Marin Builders' Association, Southern CA Contractors Association, by memorandum dated January 14, 2011.

Comment:

Due to the transient nature of the union construction industry, the aforementioned employer/industry associations request the proposal be modified to include exceptions for non-specialty safety-toe footwear and non specialty prescription safety eyewear when the employer permits these items to be worn by the employee off site and exempting the employer from having to pay for lost or intentionally damaged personal protective equipment.

Response:

The Board agrees with the rationale expressed by the associations/organizations listed above and has modified the proposal accordingly. The Board thanks those associations for their comments and participation in the Board's rulemaking process.

The CA Chamber of Commerce, Associated General Contractors of California, California Farm Bureau Federation, California Framing Contractors Association, California Professional Association of Specialty Contractors, California Construction and Industrial Materials Association, Residential Contractors Association, Associated Roof Contractors of the Bay Area Counties, Inc., Walter & Prince, LLP, SafeCon Consulting Group, Inc., by letter dated January 20, 2011.

Comment:

The commenters are in agreement with the above associations/organizations comments.

Response:

See the response to the written comment submitted by the Association of Sheet Metal and Air Conditioning Contractors' National Association, et al.

Mr. Larry Pena, Southern California Edison, by letter received January 20, 2011.

Comment:

Mr. Pena asked if California would provide clarification/guidance on what articles are covered under the employer duty to provide in a way similar to Federal OSHA's discussion in the preamble to the Final Rule.

Response:

This comment is somewhat outside the scope of comments for the proposal. The question posed by Mr. Pena is one that involves interpretation and clarification of application of the proposal and hence the employer's duty to pay. This is a matter that should be presented to the Division of Occupational Health which will be responsible for interpreting and enforcing the proposed standard. The Division has the discretion to provide such guidance through its Consultation Service or through the issuance of an administrative interpretation at the employer's request.

The Board thanks Mr. Pena for his comment and participation in the Board's rulemaking process.

II. Oral Comments

Oral comments received at the January 20, 2011, Public Hearing in San Diego, California.

Mr. Bruce Wick, representing CALPASC.

Comment:

Mr. Wick stated that the proposal should be modified to include the Federal exemptions. He stated further that employers should not have to pay for equipment for employees who elect to use their own personal protective equipment (PPE) or employees that lose or damage their PPE.

Response:

The Board agrees with Mr. Wick and has modified the proposal to include the Federal exemptions provided in 29 CFR 1910.132(h)(2)-(6).

The Board thanks Mr. Wick for his comment and participation in the Board's rulemaking process.

Mr. Chris Walker, representing SMACNA, Mr. Jerry Shupe, Safety Director for Hensel Phelps Construction, Ms. Virginia Siegel, Business Owner, Onsite Health and Safety, Mr. Michael Vlaming, representing Crane Owners Association, NOAD Employers Association and the Modular Installers Association.

Comment:

The commenters echoed Mr. Wick's comment.

Response:

See the response to the oral comment submitted by Mr. Bruce Wick.

The Board appreciates the participation of the associations in the Board's rulemaking process.

Mr. Dave Thomas, Board Member

Comment:

Mr. Thomas asked why the Federal exemptions were not included as part of the proposal.

Response:

Deliberations between Board Staff and the Division yielded a proposal absent of the Federal exemptions because the need to limit the proposal in accordance with the exemptions was not perceived at that time. The public comment period is intended to elicit stakeholder concerns of the sort that have been brought forward, and the proposal has been modified accordingly.

Mr. Guy Prescott, Board Member

Comment:

Mr. Prescott suggested staff convene an advisory committee to consider the issues presented by the commenters.

Response:

Since changes have been made in response to the commenter's concerns an advisory committee is unnecessary.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE FIRST 15-DAY NOTICE OF PROPOSED MODIFICATIONS

As a result of written comments submitted in response to the first 15-day Notice of Proposed Modifications mailed on February 16, 2011, the following, modification has been made to the Informative Digest published in the California Regulatory Notice dated, December 3, 2010.

Section 3380.1. Employer Duty to Pay for Personal Safety Devices and Safeguards.

Exception No. 6 of the proposal was further modified in an attempt to give it greater clarity, and a second 15-day Notice of Proposed Modifications was mailed on March 16, 2011.

SUMMARY AND RESPONSES TO WRITTEN COMMENTS

Mr. Van Howell, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated February 24, 2011.

Comment:

Mr. Howell indicated that upon review of the proposed modifications, the proposal appears to be commensurate with the federal Standards.

Response:

The Board thanks Mr. Howell for his comment.

Mr. J.M. MacDonald, Vice President Accident Prevention, Pacific Maritime Association, by letter dated February 28, 2011.

Comment No 1:

Mr. MacDonald stated non specialty prescription safety eyewear should be included as an exemption.

Response:

It is clearly stated in exception No. 1 that non specialty prescription safety eyewear is exempt from the employer duty to pay standard when such items are worn off the job site. Consequently, no modification of the proposal is necessary.

Comment No 2:

He stated that employee owned, upgraded and personalized PPE should be exempt from employer payment. Mr. MacDonald stated that the reference to Section 3380(d) is confusing since purchase of PPE is not pursuant to Section 3380(d).

Response:

Mr. MacDonald's comment reflects wording of 29 CFR 1910.132(h)(6). The Board agrees that these changes suggested by Mr. MacDonald will clarify the proposal and had made such changes.

Comment No 3:

Mr. MacDonald suggested separating out the last sentence of exception No. 6 into a non-bulletized follow up sentence. Mr. MacDonald stated that this would create a list of the exemptions with an explanatory sentence saying payment is not required if the PPE meets the exemptions in Nos 1-6.

Response:

Mr. MacDonald is raising a matter of style which, in the Board's opinion, does not improve the clarity of the proposal. Consequently the Board does not believe further modifications to exception No. 6 are warranted.

The Board thanks Mr. MacDonald for his comment and participation in the Board's rulemaking process.

Mr. Bruce Wick, CALPASC, Director of Risk Management, by letter dated March 1, 2011.

Comment:

Mr. Wick suggesting modifying exception No. 6 to add "where an employee provides adequate protective equipment he or she owns, the employer may allow the employee to use it and is not required to reimburse the employee for that equipment."

Response:

The Board concurs with Mr. Wick and has modified Exception No. 6 to include his suggested language absolving the employer from having to reimburse the employee for adequate employee provided PPE that is necessary for the job, consistent with language in the Federal 29 CFR 1910.132(h)(6).

The Board thanks Mr. Wick for his comment and participation in the rulemaking process.

Mr. Ralph M. Armstrong, Business and Safety Representative, IBEW Local 1245 by e-mail transmission to the Standards Board received on March 1, 2011.

Comment:

Mr. Armstrong expressed concern over whether exception No. 5 (he apparently means exception No. 4) would exclude employers from having to pay for fire resistant clothing worn by electrical workers exposed to the hazard of arc flash while performing their daily duties.

Response:

Exception No. 4 is intended to address items which do not fall under the classification of personal safety devices and safeguards necessary to protect the worker mentioned in General Industry Safety Orders (GISO), Article 10. The items described in Exception No. 4 refer to articles of clothing/apparel and personal belongings such as skin creams, ordinary sunglasses, and suntan lotion which have no special employee protection function and would not be considered a safety device or safeguard required under Article 10. Consequently, non synthetic apparel as required by the Electrical Safety Orders for employees who are exposed to arc flash or flames per Sections 2320.2 (a)(8) and 2940.6(j) are considered personal devices/safeguards which employers will continue to have the duty to pay.

The Board thanks Mr. Armstrong for his comment and participation in the Board's rulemaking process.

Mr. Shane A. Gusman, California Teamsters Public Affairs Council by letter dated March 3, 2011.

Comment:

Mr. Gusman expressed concern over exception No. 1 and stated that protective footwear and safety eyewear are critical to employee safety for many employees represented by the Teamsters. Employers of Teamster represented employees have for many years complied with California law and provided mandated personal protective equipment. Mr. Gusman stated the proposed exception No. 1 appears to contradict this long standing practice, thus creating an unsafe working environment for employees. Mr. Gusman urged the Board to reject exception No.1.

Response:

The Board believes exception No. 1 is reasonable as it applies to non specialty footwear and eyewear that is worn off the premises by the employee. Teamster represented employees should not be fearful of the possibility that their employers will not furnish and pay for safety toe footwear, as required by GISO Article 10. Labor Code Section 6400 and GISO Section 3380 require the employer to provide a safe and healthful place of employment and provide all

necessary personal safety devices and safeguards. Consistent with the federal exemptions, the proposal only applies to non-specialty footwear, meaning that it is either of a personal nature, or used in a manner that that does not render it unsafe for use off the jobsite or is not designed for special use on the job. Therefore, the Board believes no modification of Exception No.1 is necessary.

The Board thanks Mr. Gusman for his comment and participation in the rulemaking process.

Mr. Jeff Fairbanks, Safety Officer, Modesto Irrigation District by e-mail transmission to the Board dated March 3, 2011.
Comment:

Mr. Fairbanks requested the proposal specify whether employers must supply and pay for fire resistant outerwear/rainwear, even if the outerwear is worn home.

Response:

The Electrical Safety Orders require employees to wear apparel that will not exacerbate the effects of arc flash or fire upon the employee working on or in proximity to energized conductors. Such apparel is considered a personal safeguard and, as dictated by the language of the first paragraph of Section 3380.1, must be provided at no cost to the employee. In this case, proposed exception No. 4 which is intended to address clothing and personal effects which have no relation to providing employees safety from job specific recognized hazards would not apply.

The Board thanks Mr. Fairbanks for his comment and participation in the rulemaking process.

Mr. Bill Taylor, CSP, Public Agency Safety Management Association (PASMA) by e-mail transmission to the Board dated March 4, 2011.

Comment:

Mr. Taylor indicated expressed support for the proposed exceptions.

Response:

The Board thanks Mr. Taylor for his comment and participation in the rulemaking process.

Mr. Daniel De La Cruz, Environmental Compliance Inspector, Industrial Waste Management Inspector, City of Los Angeles by e-mail Transmission received on March 4, 2011.

Comment:

Mr. De La Cruz stated he disagreed with Exception No. 1 and stated it should not be included in the proposal. He is concerned that it would allow employers to abrogate their duty to provide

employee safeguards such as safety toe foot wear for employees visiting jobsites where employees must wear such footwear.

Response:

Exception No. 1 does not abrogate the employers' responsibility to provide and pay for PPE and safeguards as required by Section 3380.1 and GISO Article 10. The use of safety toe footwear at places of employment, such as where Mr. De La Cruz conducts inspections, are examples of the use of PPE which his employer has the duty to provide and pay for. The Board believes that when an employee is an inspector and must conduct site visits to other places of employment where he/she may be exposed to the hazards of foot injuries, the use of safety footwear is necessary. Exception 1 applies in cases where the footwear is worn in non occupational situations as a matter of convenience by the employee as general footwear, in which case the employer under Exception No.1 is not responsible for payment.

The Board thanks Mr. De la Cruz for his comment and participation in the Board's rulemaking process.

Mr. Donald Jojola, City of Los Angeles, Environmental Compliance Inspector, Industrial Waste Management Division, by e-mail transmission dated March 4, 2011.

Comment:

Mr. Jojola's comment echoed that of Mr. De la Cruz indicated above.

Response:

See the response to Mr. De la Cruz's comment. The Board thanks Mr. Jojola for his comment and participation in the Board's rulemaking process.

Mr. Terry Thedell, Ph.D., CIH, CSP, Health and Safety Advisor, San Diego Gas and Electric, by e-mail transmission dated March 4, 2011.

Comment:

Mr. Thedell expressed support for the proposed exceptions.

Response:

The Board thanks Mr. Thedell for his support of the proposal and his participation in the Board rulemaking process.

Mr. Kevin D. Bland, Hines Smith Carder Dincel Bland, LLP, Counsel to the California Framing Contractors Association by e-mail transmission dated March 4, 2011.

Comment:

Mr. Bland echoed Mr. Bruce Wick's comment submitted to the Board by letter dated March 1, 2011.

Response:

See the response to Mr. Bruce Wick's written comment dated March 1, 2011.

The Board thanks Mr. Bland for his comment and participation in the Board's rulemaking process.

ADDITIONAL DOCUMENTS RELIED UPON

1. U.S. Department of Labor, Occupational Safety and Health Administration, www.osha.gov, Regulations (Standards -29-CFR), 29 CFR 1910.132(h)(2)-(6).

This document is available for review Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE SECOND 15-DAY NOTICE OF PROPOSED MODIFICATIONS

As a result of written comments submitted in response to the second 15-day Notice of Proposed Modifications mailed on March 16, 2011, the following, modification has been made to the Informative Digest published in the California Regulatory Notice dated, December 3, 2010.

Section 3380.1. Employer Duty to Pay for Personal Safety Devices and Safeguards.

Modifications were proposed to remove the exceptions that were the subject of the prior 15-day Notices, and a third 15-day Notice of Proposed Modifications was mailed on September 9, 2011.

SUMMARY AND RESPONSES TO WRITTEN COMMENTS

Van A. Howell, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated March 21, 2011.

Comment:

The modification resulting from the second 15-Day Notice appears to be commensurate with federal regulation.

Response:

The Board thanks Mr. Howell for his comment.

Corey N. Friedman, Staff Attorney, Worksafe, Inc., by letter dated March 29, 2011.

Comment:

The addition of exceptions to the employer's duty to pay for personal protective equipment (PPE) is contrary to Labor Code Sections 6401 and 6403, as well as related case law, notably, *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979), 25 Cal. 3d 465. Consequently, the proposal, because of the exceptions, fails to met the "consistency" criterion applicable to regulatory proposals. In addition, some of the proposed exceptions are flawed in specific respects (i.e., Exception 1 creates a loophole that would enable employers to evade the duty to pay for PPE; Exception 4 is unnecessary insofar as it addresses everyday clothes, and insofar as Exception 4 pertains to foul weather clothing, it would require employees in certain occupations to provide PPE that clearly is needed for their protection; Exceptions 5 and 6 are unclear).

Response:

The Board disagrees that it is precluded as a matter of law from adopting reasonable exceptions to the employer's duty to pay for PPE. The *Bendix* decision and other legal authority cited by Mr. Friedman address controversies other than the scope of the Board's rulemaking authority in this area. The court in *Bendix* leaves the door open to at least one possible exception (shifting the duty to pay for PPE to employees pursuant to collective bargaining agreements). Labor Code Sections 6401 and 6403 include the concept of reasonableness, and the law disfavors absurd results, which is an indication that reasonable exceptions may be legally permissible, especially when they negate absurd results. In addition, at least one court has said words to the effect that Labor Code Sections 6401 and 6403 should not be applied in a literal, unbending manner (see *California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002), 96 Cal. App. 4th 824).

Consider, for example, the exception for everyday street clothing. Mr. Friedman says that the exception is not needed because "No one considers an everyday outfit to be safety equipment." Yet, a literal reading of Labor Code Sections 6401 and 6403 could lead to a contrary, albeit absurd, conclusion. Thus, an exception addressing everyday street clothing may well be desirable and legally permissible.

Nonetheless, Mr. Friedman's comments and others summarized below show that there is far from a consensus among stakeholders regarding the efficacy of exceptions in general and the proposed exceptions in particular. The Board's customary approach to rulemaking is to build consensus wherever possible and, wherever possible, to avoid precipitous changes in the status quo without giving thorough consideration to the concerns of stakeholders. Based on these factors, the Board will again amend the proposal, this time deleting the exceptions. Before exceptions to the employer's duty to pay for PPE are again considered (if they are again considered), the Board anticipates that an advisory committee will be convened or that some other appropriate means will be utilized by Board staff to give thorough consideration to the arguments of the proponents and opponents of possible exceptions. The fact that two prior 15-Day Notices have been needed in order to draft and refine the possible exceptions is a further indication that the possible exceptions would benefit from further consideration.

This course of action does not impact employers negatively. Proceeding with the proposal minus the exceptions will add clarity to an arguably murky area of the law, but it will not alter the status quo. Even though there is no specific California occupational safety and health standard regarding the employer's duty to pay for PPE, when the issue has arisen, employers have had to pay for PPE without any exception, as illustrated by such decisions as *Oakland Peace Officers Association v. City of Oakland* (1973), 30 Cal. App. 3d 96; *Bendix*; the Occupational Safety and Health Appeals Board (OSHAB) Decision after Reconsideration in *Southern California Edison* (1985), Docket No. 81-R4D4-663; and the OSHAB Administrative Law Judge decision in *Labor Ready Southwest, Inc.* (2001), Docket No. 01-R1D1-002.

Sheheryar Kaoosji, Project Coordinator, Warehouse Workers United, by letter dated March 31, 2011.

Comment:

The addition of exceptions to the employer's duty to pay for PPE is contrary to California law.

Response:

See the response to Mr. Friedman's comment.

Michael Meuter and Anne Katten, California Rural Legal Assistance Foundation, Inc., by letter dated April 1, 2011.

Comment:

This comment is essentially the same as Mr. Friedman's comment.

Response:

See the response to Mr. Friedman's comment.

Jeremy Smith, Deputy Legislative Director, State Buildings and Trades Council of California, by letter dated April 1, 2011.

Comment:

This comment is essentially the same as Sheheryar Kaoosji's comment.

Response:

See the responses to Sheheryar Kaoosji's and Mr. Friedman's comments.

FURTHER ADDITIONAL DOCUMENTS RELIED UPON

1. *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979), 25 Cal. 3d 465
2. *Oakland Peace Officers Association v. City of Oakland* (1973), 30 Cal. App. 3d 96
3. The Occupational Safety and Health Appeals Board (OSHAB) Decision after Reconsideration in *Southern California Edison* (1985), Docket No. 81-R4D4-663
4. The OSHAB Administrative Law Judge decision in *Labor Ready Southwest, Inc*. (2001), Docket No. 01-R1D1-002
5. *California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002), 96 Cal. App. 4th 824

These documents are available for review Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California.

FURTHER ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE THIRD 15-DAY NOTICE OF PROPOSED MODIFICATIONS

No further modifications to the information contained in the Initial Statement of Reasons are proposed as a result of the third 15-Day Notice of Proposed Modifications mailed on September 9, 2011.

SUMMARY AND RESPONSE TO WRITTEN COMMENTS

Bill Taylor, President, South Chapter, Public Agency Management Association, by letter dated September 21, 2011.

Comment No. 1:

By deleting the exceptions that have always been applicable to the Federal personal protective equipment (PPE) payment standards, the proposal alters the status quo without listening to all the stakeholders.

Response:

Removing the exceptions from the proposal does not alter the status quo. The exceptions have been part of a proposal, not a California occupational safety and health standard. The Federal standards, including the Federal exceptions, are not, and have not been, operative in California. The exceptions are deleted at this time so that further consideration may be given to possible exceptions in light of the sharp lack of stakeholder consensus indicated in comments received during this rulemaking process.

Comment No. 2:

Deleting the exceptions will add to the confusion as to what PPE must be paid for.

Response:

The Board believes that the proposal without the exceptions—a straightforward statement to the effect that employers must pay for safety-order-required PPE—is not confusing. Please also see the Response to Mr. Taylor's Comment No. 4.

Comment No. 3:

If previously-proposed Exception No. 6 is deleted, employers will have to pay for more PPE than they would have to pay for if Exception No. 6 were adopted.

Response:

The Board believes that adoption of exceptions at this time is premature. See the response to Mr. Taylor's Comments No. 1 and No. 4.

Comment No. 4:

The deletion of Condition No. 4 might make employers subject to citation if they fail to pay for such ordinary items as sunglasses and sunscreen.

Response:

This concern should be given due consideration when the entire matter of possible exceptions, and the legal basis for allowing any exception, is vetted in a more comprehensive fashion than is afforded by 15-day Notice comments and responses—possibly via an advisory committee.

Even without the exceptions, the underlying proposal is necessary to ensure that California standards are at least as effective as commensurate Federal standards and to enunciate properly a requirement that the courts and the Occupational Safety and Health Appeals Board (OSHAB) have made applicable to California employers for many years. Employers and employees benefit from the clarity that results when such a requirement is in the form of an occupational safety and health standard in Title 8, as opposed to the current situation where the requirement must be deduced from such legal authority as court and OSHAB opinions.

The proposal, without the exceptions, is neither intended nor anticipated to expose employers to expense or liability other than that which they have borne for many years under California case law. The limited impact of the proposal is reflected in its wording. It is not an open-ended requirement that employers pay for PPE. It is only a clarification of what other safety orders already require. The proposed Section 3380.1 says in part that "Whenever any safety order in Division 1 of Title 8" requires the provision of PPE, the PPE must be furnished at no cost to the employee. In other words, a safety order other than Section 3380.1 must require the PPE before the employer must pay for it.

OSHAB already has interpreted "provide" to mean "pay for" (see the OSHAB Administrative Law Judge decision in *Labor Ready Southwest, Inc.* (2001), Docket No. 01-R1D1-002). Thus, even in the absence of the proposed Section 3380.1, the Division of Occupational Safety and Health (Division) could cite an employer under Section 3384(a) for failing to pay for required hand protection (as was done in *Labor Ready*), and the employer should expect OSHAB to affirm the citation (as was done in *Labor Ready*). The proposed Section 3380.1 adds clarity; it does not expand the employer's duty.

In addition, as to the Board's opinion regarding the general propriety of exceptions, please see the Response, provided after the second 15-day Notice, to the Comment made by Corey N. Friedman.

Corey N. Friedman, Attorney, Worksafe, Inc., by letter dated September 22, 2011.

Comment:

Ms. Friedman concurs with the elimination of the exceptions, further discusses legal authority of the sort cited in her comment in response to the second 15-Day Notice and mentions alternatives to exceptions as means of avoiding absurd results (i.e., the exercise of discretion by the Division and by OSHAB administrative law judges).

Response:

Please see the Response to Mr. Taylor's Comment No. 4. The Board does not necessarily agree that relying on the discretion of enforcement and adjudicative agencies is the optimum means of avoiding absurd results, when a reasonable and legally-permissible regulation could serve the same end in a more straight-forward and dependable manner—this topic is among the topics that should be considered as the entire issue of exceptions is given greater consideration.

Frances C. Schreiberg; Kazin, McClain, Lyons, Greenwood & Harley, PLC; by letter dated September 23, 2011.
Comment:

Her firm represents asbestos workers who should have been provided with employer-paid-for PPE. Removing the exceptions makes the proposal consistent with California law.
Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Gary Schongar, Corporate Safety & Environmental Compliance, Verizon, by letter dated September 23, 2011.

Comment:

While Verizon agrees that, in most instances, employers should have to pay or required PPE, Verizon believes that there should be an exception for items that are personal in nature and commonly worn by employees off the job. Verizon's practice of offering an employee a work boot allowance benefits the employees and the company, and inflexible employer-must-pay requirements are particularly inappropriate where employees are covered by collective bargaining agreements.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Michael Marsh, Directing Attorney, California Legal Assistance, Inc. (CRLA), by letter dated September 23, 2011.

Comment:

CRLA agrees with the deletion of the exceptions, believes that California law precludes exceptions and asserts that one previously-proposed exceptions would undercut an industry practice whereby most agricultural employers provide raingear to farmworkers required to work in the rain.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Bruce Wick, Director of Risk Management, California Association of Specialty Contractors (CALPASC), by letter dated September 23, 2011. Forty five other commenters joined in this CALPASC comment and did not make additional substantive comments.

Comment:

The exceptions proposed for deletion should be retained, in that the exceptions make sense and "comport very well with" Labor Code Sections 6401 and 6403. The exceptions are virtually verbatim of federal OSHA provisions. Late-in-the-game comments should not result in the peremptory elimination of the comments, and if there is concern about lack of consensus, an advisory committee should be convened.

Response:

Please see the Response to Mr. Taylor's Comment No. 4, and with respect to the interplay with federal standards, the Response to the Comment by Chris Handley and Shawn Shingler.

Terry Thedell, Health and Safety Advisor, San Diego Gas and Electric, by e-mail dated September 23, 2011.

Comment:

Retention of the exceptions promotes consistency with federal standards, and the exceptions that speak to non-specialty safety-toe protective footwear, prescription eyewear, everyday clothing and intentional destruction/loss of PPE are specifically mentioned as beneficial. The exceptions "provide clarity and definition to the purpose of both protection and compliance."

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Kate Leyden, Executive Director, Valley Contractors Exchange, by e-mail dated September 26, 2011.

Comment:

Ms. Leyden's organization consists of small construction companies that operate in high-hazard industries and that would be negatively impact by added cost and liability if the exceptions are deleted. "Requiring construction businesses to buy their workers' boots, hats and pants will not improve safety. Rather, construction companies will see it as a tipping point and will just throw in the towel. At a minimum, they will not be encouraged to hire anyone."

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Virginia Siegel, Owner, Onsite Health & Safety, by letter dated September 26, 2011.

Comment:

"We strongly recommend that the Board adopt 8 CCR 3380.1 as written by Fed OSHA, including the exceptions identified in 29 CFR, 1910.132 (h)." The proposal, without the exceptions, will add costs for employers and increase unemployment. Work attire should be "left up to our state's very capable employee-employer bargaining units….We urge the Division not to adopt this rule without the exceptions."

Response:

Please see the Response to Mr. Taylor's Comment No. 4. Also, there are worksites where there are no "employee-employer bargaining units."

Catherine Greer, Greer Gardens Landscape Design and Installation, Inc., by e-mail dated September 27, 2011.

Comment:

Ms. Greer joined in the CALPASC comment and added that government regulations that cost time and money have contributed to staff cutbacks. Also, the proposed deletion of the exceptions distracts OSHA from "more important issues" and distracts businesses from making jobs.

Response:

Please see the Response to Mr. Taylor's Comment No. 4 and the Response to Mr. Wick's comment.

Rick DeLao, President, Communication Workers of America Local 9431, by letter dated September 27, 2011.

Comment:

Removal of the exceptions results in a proposal that clearly states current California law and spares employees the choice of tolerating dangerous conditions or paying for necessary PPE.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

J. Kevin Pedrotti of JK Pedrotti Government Relations, on behalf of the Golden State Builders Exchange, by memo dated September 27, 2011.

Comment:

The proposal, without the exceptions, goes beyond the federal standard and substantially burdens California employers. The exception regarding non-specialty safety-toed footwear and non-specialty prescription safety eyewear and the exception regarding lost or intentionally damaged PPE are given special mention. Also mentioned is the burden on employers when employees move from employer to employer for short-term projects.

Response:

Please see the Response to Mr. Taylor's Comment No. 4 and, with respect to the interplay with federal standards, the Response to the Comment by Chris Handley.

Sara Flocks, Public Policy Coordinator, California Labor Federation, by letter dated September 27, 2011. Six other commenters joined in this comment and did not make additional substantive comments.

Comment:

Removing the exceptions is consistent with California's longstanding rule that employers pay for PPE. That rule promotes safety and is especially beneficial to low-wage workers.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

The Associated Members of the Humboldt Builders' Exchange, Inc., by e-mail dated September 28, 2011.

Comment No. 1:

The exceptions, which are matters of common sense, should be retained.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Comment No. 2:

"It is not particularly in the best safety interest of California employees or employers when Cal OSHA says that a particular regulation 'does not exists [sic], but operates as a decision of the California Supreme Court.'"

Response:

The Board agrees. The commenter's point is the reason for proceeding with the proposal minus the exceptions.

Comment No. 3:

The "exemptions currently listed in section 3380.1 should be left intact."

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Jacqueline Nowell, Director, OSH Office, United Food & Commercial Workers International Union, CLC, by letter dated September 29, 2011.

Comment:

The commenter supports deletion of the exceptions, noting that the proposal without the exceptions provides a clear rule that augurs against the improper shift of PPE costs from employers to employees.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Benjamin K. Lunch of the law firm of Neyhart, Anderson , Flynn & Grosboll, representing the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 342, by letter dated September 28, 2011.

Comment:

Deleting the exceptions is consistent with California law. Including the exceptions would expose employees, especially building trades employees who lack union representation, to dangerous working conditions or de facto wage reductions.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Kevin Ahlswede, Director, Staff Resources, Inc., by letter dated September 28, 2011.

Comment:

The exceptions should remain, as they are the result of thoughtful consideration of worker preferences, responsibility and reasonableness for employers. Small companies will decrease hiring if required to pay for such things as steel-toe boots and apparel for heat illness prevention and cold weather protection.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Van A. Howell, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated September 28, 2011.

Comment:

The modification resulting from the third 15-Day Notice appears to be commensurate with federal regulation.

Response:

The Board thanks Mr. Howell for his comment.

Yungsuhn Park, Senior Attorney, Asian Pacific American Legal Center, by letter dated September 28, 2011.

Comment:

The exceptions should be removed, and doing so is consistent with case law.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Chris Handley, by e-mail sent September 29, 2011. Two other commenters joined in this comment and did not make additional substantive comments.

Comment:

The proposal, without the exceptions, would have a significant, negative economic impact on persons and businesses, including small businesses. The proposal, with the exceptions, is as effective as the commensurate federal standard, and the exceptions should be retained.

Response:

The Board disagrees that the proposal would have the negative economic impact of concern to the commenter, in that the proposal, without the exceptions, does not expand employer responsibility to pay for PPE beyond what is currently provided in California law. Even though the federal standard allows various exceptions, it is not at all clear that California law, even if it allows various reasonable exceptions as the Board believes, allows all the exceptions stated in the federal standards. Please also see the Response to Mr. Taylor's Comment No. 4 and the Response to Mr. Shingler's Comment.

Sheheryar Kaoosji, Project Coordinator, Warehouse Workers United, by letter dated September 29, 2011.

Comment:

Removing the exceptions is consistent with California's longstanding rule that employers pay for PPE. That rule promotes safety and is especially beneficial to low-wage workers. There have been instances where warehouse workers in western San Bernardino County and Riverside County have been exposed to serious injury and illness hazards, and the workers have had to pay for the PPE needed to safeguard them from those hazards.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Lawrence P. Halprin, Partner, Keller and Heckman LLP, by e-mail sent September 29, 2011.

Comment:

California law does not preclude inclusion of the exceptions. Also, removal of the exceptions would require employers to do more than what is required by Labor Code Sections 6401 and 6403.

Response:

While the Board agrees that California law does not necessarily preclude reasonable exceptions, the Board does not agree that the deletion of the previously-proposed exceptions is contrary to Labor Code Sections 6401 and 6403. Please see the response to Mr. Taylor's Comment No. 4.

California Chamber of Commerce; Associated General Contractors of California; Associated Roofing Contractors of the Bay Area Counties, Inc.; California Farm Bureau Federation; California Framing Contractors Association, and Residential Contractor's Association, by letter dated September 29, 2011.

Comment:

The exceptions are consistent with the federal standards; are reasonable, common sense allocations between employers and employees of the responsibility to pay for PPE and provide needed clarity to California employers. California employers should not be disadvantaged by restrictive, burdensome, costly regulations, especially in the current economic climate.

Response:

Please see the Response to Mr. Taylor's Comment No. 4.

Shawn Shingler, Vice President, Trilogy Construction Inc., by undated memo.

Comment:

California should use the federal standards in its entirety; it is unreasonable to remove the exceptions that are allowed in other states.

Response:

California occupational safety and health standards often are more protective than federal standards, and providing such extra protection is not unreasonable. Please see the Response to Mr. Taylor's Comment No. 4 and the Response to Chris Handley's Comment.

DETERMINATION OF MANDATE

This regulation does not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed regulation. No alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the adopted action.